IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Emily M. Harlin, Plaintiff, vs. Wells Fargo Bank NA, Defendant.	C/A No. 3:13-cv-02719-JFA **ORDER**

I. INTRODUCTION

Before the court is Defendant's motion for this court to reconsider[1] the denial of Defendant's motion for judgment on the pleadings as it relates to Plaintiff's claim under the South Carolina Unfair Trade Practices Act ("SCUTPA"). Ordinarily, a court should grant a motion to reconsider only when: (1) an intervening change in controlling law occurs; (2) additional evidence not previously available has been presented; or (3) the prior decision was based on clear error or would work manifest injustice. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). None of those circumstances exist here. However, because the court offered no rationale for allowing Plaintiff's SCUTPA claim to proceed, the court now offers its rationale in full. For the following reasons, the court denies Defendant's motion for reconsideration and affirms its denial of Defendant's motion for judgment on the pleadings as to Plaintiff's SCUTPA claim.

II. FACTUAL AND PROCEDURAL HISTORY

This action stems from a home loan and mortgage entered into between Plaintiff (the borrower) and Defendant (the lender). Plaintiff defaulted, and on April 11, 2007, Defendant

[1] Defendant moved pursuant to FRCP 54(b)(2) and FRCP 59(e). ECF No. 31, p.3.

filed suit to foreclose on Plaintiff's home. In December 2010, Plaintiff and Defendant settled that foreclosure suit by Defendant allowing Plaintiff to live in her home, without making any payments to Defendant. Otherwise, Defendant retained its rights under the note and mortgage—namely to make itself whole from any sale of the home. Obviously, this meant that Defendant's collection efforts were to cease. Defendant also agreed to request credit bureaus to remove credit references to Plaintiff in connection with the accounts related to Plaintiff's home loan.

Defendant did not hold its end of the bargain. On January 25, 2011,[2] the trustee for the pool in which Plaintiff's note was held filed a new foreclosure action against Plaintiff. Subsequently, Defendant, or its agents, attempted to collect the alleged debt from Plaintiff on fifteen separate occasions, ranging from visits to Plaintiff's home to mailed statements. Defendant also failed to request or cause credit bureaus to remove all credit references to Plaintiff in connection with the accounts related to Plaintiff's home loan. This suit followed.

After filing an Answer, Defendant moved pursuant to Rule 12(c) for a partial judgment on the pleadings. Plaintiff stipulated to the dismissal of "Plaintiff's claims of breach of contract accompanied by a fraudulent act, intentional infliction of emotional distress, and violation of S.C. Code § 37-5-108." ECF No. 18, p.1. However, Plaintiff objected to the dismissal of Plaintiff's claim under SCUTPA. This court agreed with Plaintiff, and denied Defendant's Rule 12(c) motion as to SCUTPA in a short order, without providing a rationale. Defendant moved the court to reconsider its decision.

As argued in its Rule 12(c) motion, Defendant argued in its motion to reconsider that Plaintiff's SCUTPA claim had already been settled in a previous suit[3] by the South Carolina

[2] Plaintiff's complaint alleges January 24, 2010, but a review of publicly available records shows that suit was actually filed on January 25, 2011. *See HSBC Bank NA v. Emily M. Harlin*, 2011CP1000475 (S.C. Ct. of Comm. Pleas).

[3] *United States v. Bank of Am. Corp.*, Case No. 1:12-cv-361-RMC (D.D.C.) ("National Mortgage Litigation").

Attorney General, representing Plaintiff in the Attorney General's *parens patriae* capacity. That settlement is commonly referred to as the National Mortgage Settlement and the terms of that settlement were reduced to a Consent Judgment. *See* ECF No. 17-3 ("Consent Judgment"). The United States, every state except for Oklahoma, and the District of Columbia were signatories of the Consent Judgment on the one hand, and five major banks, including Defendant, were signatories on the other. Having already received ample briefing on the meaning of the Consent Judgment, this court requested additional briefing on the adequacy of the South Carolina Attorney General's alleged representation of Plaintiff, considering that the vast majority of monies obtained by South Carolina in the National Mortgage Settlement went to the state's general fund, and not to victims of unfair mortgage practices. *See* 2012-2013 Appropriations Bill, H. 4813, Part IB, Section 90, proviso 90.19, 2011-2012 Leg., 119th Sess. (S.C.).

The South Carolina Attorney General filed two letters with this court, the first opining that South Carolina specifically reserved the *private* causes of action citizens may have under SCUTPA, and the second opining that the Attorney General's representation in obtaining the Consent Judgment was, therefore, constitutionally adequate, regardless of how the monies obtained from the settlement were used.[4] ECF No. 36-1; ECF No. 42. In two unsolicited responses to the South Carolina Attorney General's letters, Defendant argued for the first time that Defendant is exempted from SCUTPA liability because banks are part of a regulated industry.

III. LEGAL STANDARD

Courts "appl[y] the same standard for Rule 12(c) motions as for motions made pursuant to Rule 12(b)(6)." *Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 405-

[4] The South Carolina Attorney General requested to replace the first letter with the second letter. The two letters are not inconsistent, and this court left both letters on the docket.

06 (4th Cir. 2002). When considering a motion to dismiss under Rule 12(b)(6), the court must accept as true the facts alleged in the complaint and view them in the light most favorable to the plaintiff. *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (4th Cir. 1999). The United States Supreme Court has stated, however, that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a pleading "will not do" if it merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Accordingly, Plaintiff must put forth claims that cross "the line from conceivable to plausible." *Id.* at 680 (internal quotation omitted). The court "need not accept the [plaintiff's] legal conclusions drawn from the facts," nor need it "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 616 n.26 (4th Cir. 2009) (citation omitted).

IV. PRECLUSION

For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir. 1981). Defendant argues that the State of South

Carolina represented Plaintiff in *parens patriae* when the Attorney General of South Carolina entered into the Consent Judgment, settling *all* claims for causes of action based upon covered conduct and the laws of the various states creating causes of action for "Unfair and Deceptive Acts and Practices" ECF No. 17-3, p.1. There is no dispute that Plaintiff is asserting SCUTPA, an identified cause of action in both the National Mortgage Litigation and this litigation, based upon the same covered conduct—a wide range of allegedly improper mortgage practices, including the practices giving rise to Plaintiff's SCUTPA claim.

The plain text of the Consent Judgment, however, shows that a borrower, such as the plaintiff here, is specifically exempted from the Consent Judgment. The Consent Judgment provides:

> The following claims are hereby not released and are specifically reserved ... [c]laims and defenses asserted by third parties, including individual mortgage loan borrowers on an individual or class basis.

ECF No. 17-3, p. 273-277. Plaintiff, an individual mortgage loan borrower, squarely meets this exemption. Further evidence that the Consent Judgment does not apply to Plaintiff's claim as an individual is that the release of covered conduct applies only to claims "that an Attorney General or Regulator, respectively, has or may have or assert."[5] ECF No, 17-3, p. 272.

Defendant argues that:

> Wells Fargo agreed to pay over $5 billion in exchange for a full release from potential liability with respect to all conduct that formed the basis of the government's claims. It would make little sense for any litigant to resolve a case by paying such a high sum of money, only to leave itself eligible to be sued for the exact same alleged conduct by the very people who were represented by the named parties in the prior suit.

[5] SCUTPA provides for a private cause of action, S.C. Code Ann. § 39-5-140, and causes of action for the Attorney General to seek an injunction and civil penalties, S.C. Code Ann. § 39-5-110 and S.C. Code Ann. § 39-5-50. *See* ECF No. 36-1.

ECF No. 20, p. 4. The court notes that the settlement related to allegedly improper home mortgage practices in almost the entire country; the court is, therefore, not in a position to accept Defendant's inference that $5 billion is a large amount of money in context. Even if the court were to accept this inference, the court cannot ignore the plain language exempting "individual mortgage loan borrowers." ECF No. 17-3, p. 277.

The court finds Defendant's assertion that Wells Fargo paid "for a full release"[6] disingenuous in light of the several exemptions, including the one at issue, provided for in the Consent Judgment. ECF No. 20, p. 4; ECF No. 17-3. The court also rejects Defendant's argument that the third parties—"individual mortgage loan borrowers on an individual or class basis"—refers to the State of Oklahoma. ECF No. 20, p. 4. It is true that the State of Oklahoma was not a party to the Consent Judgment, but it would defy reason for any drafter to exempt "individual mortgage loan borrowers on an individual or class basis," when the drafter in fact meant to exempt the State of Oklahoma. There is also no need to exempt a party that is plainly not a part of an agreement.

This court is not the only court to find private citizen claims exempted from the Consent Judgment. Judge James E. Boasberg, also of the United States District Court for the District of Columbia, held that a private citizen did not have standing to enforce the Consent Judgment because "claims by individual borrowers, such as Plaintiff, are excluded from the Consent Judgment. In other words, such borrowers may still bring suits against Wells Fargo." *Ghaffari v. Wells Fargo Bank.* N.A., CV 13-115 (JEB), 2013 WL 6070364 (D.D.C. Nov. 19, 2013). Similarly, Judge Rosemary M. Collyer,[7] United States District Court for the District of

[6] The Court of Appeals for the District of Columbia rejected this week a similar argument by Wells Fargo construing the same Consent Judgment, but in a different context. *See United States of America v. Bank of America Corporation, et al.*, No. 13-5112 (D.C. Cir. June 10, 2014).

[7] Judge Collyer is the Judge that approved the Consent Judgment.

Columbia, rejected an objection to a different consent judgment by a private citizen, in part, because the private citizen could not "actually claim injury from the [c]onsent [j]udgment because the [c]onsent [j]udgment preserves the claims of individual homeowners." *Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp.*, CV 13-2025 (RMC), 2014 WL 1925552 (D.D.C. May 15, 2014). The consent judgment in that case—also settling alleged misconduct in home mortgage practices on behalf of every state but Oklahoma—used the exact same language as the Consent Judgment in this case, exempting "[c]laims and defenses asserted by third parties, including individual mortgage loan borrowers on an individual or class basis." *Id.* The application of that exemption in this instance has also been confirmed by the South Carolina Attorney General on two occasions by letter to this court.[8]

V. DEFENDANT'S MOTION TO STRIKE

In asking this court to strike Defendant's references to pleadings in the National Mortgage Litigation, Defendant argues that "pleadings from another case cannot support a claim under [the public interest element of SCUTPA]." ECF No. 31. Defendant cites to an unreported Fourth Circuit Court of Appeals case for this proposition. The Fourth Circuit "ordinarily do[es] not accord precedential value to [its] unpublished decisions ... and they are 'entitled only to the weight they generate by the persuasiveness of their reasoning.'" *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219 (4th Cir. 2006). There is little persuasiveness of the reasoning in the case cited by Defendant, because that case held that references to another "complaint offered without further evidentiary support did not establish an adverse impact on the public interest and were not sufficient to withstand [the opposing party's] factually supported request for summary judgment." *Beattie v. Nations Credit Fin. Servs. Corp.*, 69 F. App'x 585, 590 (4th Cir. 2003). In

[8] "It is our position that Ms. Harlin's claim is not precluded by the 2012 settlement ... [w]e did not settle—and, in fact, expressly excluded from the settlement—all *private* claims citizens of our State may elect to bring." ECF No. 36-1. "Our representation of the State ... does not affect the consumer case." ECF No. 42.

other words, that case found that one party failed to overcome another party's properly supported motion for summary judgment, and this case involves a motion for judgment on the pleadings.

Because courts "appl[y] the same standard for Rule 12(c) motions as for motions made pursuant to Rule 12(b)(6)," a court may properly consider public records integral to the complaint, the authenticity of which are unchallenged, on a Rule 12(c) motion. *Burbach*, 278 F.3d at 405-06; *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999); *see also Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). Therefore, the court will not strike Plaintiff's references to publicly available documents in the litigation that led to the Consent Judgment. The court notes that this is not a ruling on the discoverability or admissibility of information from that case.

VI. SCUTPA AND FEDERALLY REGULATED BANKS

Defendant filed two unsolicited briefs, arguing that "Wells Fargo, as well as all other federally-regulated banks, is exempt from claims under [SCUTPA] ... [because SCUTPA] does not apply to entities that are regulated by other administrative bodies." ECF No. 43. Plaintiff replied. The court construes this new argument as another motion for a judgment on the pleadings, pursuant to Rule 12(c). The unpublished Fourth Circuit opinion cited by Defendant in support of its motion to strike is directly on point. It provides:

> Section 39-5-40(a) of the SCUTPA provides that the Act does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." ...
>
> The South Carolina Supreme Court has stated that this exemption "is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." *Ward v. Dick Dyer & Assocs.*, Inc., 304 S.C. 152, 403 S.E.2d 310, 312 (1991). The Ward court indicated that the exemption is not meant to exclude *every* activity regulated by another agency or statute, rather it is meant to ensure that companies are not subjected to lawsuits for following an agency regulation or statute. *Id.* Therefore, NationsCredit is not

> protected from lawsuits for "general activity." *See id.* There is no indication that a statute or agency regulation requires or permits Nations Credit to pursue collection and foreclosure activities on accounts purportedly satisfied by an LMS affidavit. Therefore, NationsCredit is not exempt from liability under the SCUTPA.

Beattie v. Nations Credit Fin. Servs. Corp., 69 F. App'x 585, 587-88 (4th Cir. 2003). Although an unpublished decision, the court finds *Beattie* to accurately state and apply the law, and also finds the reasoning of *Beattie* persuasive on this point. *Collins*, 468 F.3d at 219 (4th Cir. 2006). The court, therefore, rejects Defendant's eleventh-hour argument in support of dismissing Plaintiff's SCUTPA claim pursuant to Rule 12(c).

VII. CONCLUSION

The court denies Defendant's Motion for Reconsideration. ECF No. 31.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

June 16, 2014
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge